SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 462

POWERS HIGGINBOTHAM,

Appellant,

vs.

CITY OF BATON ROUGE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA.

PETITION FOR REHEARING.

P. G. Borron,
E. R. Schowalter,
Edward Rightor,
Counsel for Appellant.

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APPLICATION FOR REHEARING.

The petition of Powers Higginbotham, appellant, respectfully represents:

That the opinion and decree rendered in this cause on the 17th day of April in the year 1939 is erroneous and contrary to the law and the evidence, and prejudicial to the interests of petitioner, and that a rehearing should be granted in this matter, for the following reasons, to-wit:

(1) The Court is in error in accepting and following the erroneous statement or assumption of the State court, that the Commission Council had the authority under its general charter acts, and being Acts No. 169 of 1898; 207 of 1912 and 249 of 1914, to discharge appellant, at pleasure

and without cause, in disregard of the terms of the contract of employment authorized by Section 4 of Act 13 of the Third Extraordinary Session of the Legislature for the year 1934 and the resolution of the Commission Council of date the 9th day of January of the year 1935 (R. 5), in that the Court has apparently overlooked and failed to consider the *vital fact* that *Section 21 of Act 13 of the Third Extraordinary Session of the Legislature for the year 1934*, authorizing the contract of employment, *expressly repeals all laws or parts of laws in conflict with its provisions*, and provides that cities and towns that have heretofore voted to come under or adopted the provisions of Act No. 302 of 1910 and Act No. 207 of 1912, shall continue to operate under said act *as modified by said Act 13*. (See "Brief on Behalf of Appellant in Opposition to Motion to Dismiss Appeal," page 5; Assignment of Errors, R. 32, paragraph 5; R. 36, paragraph 4, where the manifest error of the State court here is pointed out and discussed).

(2) The Court is in error in accepting and following *as applicable to the present case*, the statement of the State court that the general rule that a municipal council "may remove at any time any official appointed or elected by the council, or anyone *employed* by the council to perform governmental function," had been recognized in former decisions of the Supreme Court of the State of Louisiana, and being the cases of *Kirkpatrick* v. *City of Monroe*, 157 La. Rep. 645, 102 So. 822, and *State ex rel. Loeb, Mayor of Opelousas*, v. *Jordan*, 149 La. 313, 89 So. 15. (See "Brief On Behalf Of Appellant In Opposition To Motion To Dismiss Appeal," pages 7 to 9, where the two cases are discussed and shown not to be applicable to nor controlling in this case, and the manifest error of the State court pointed out).

(3) The Court is in error in accepting and following the erroneous pronouncement of the State court that appellant's position under the special contract of employment was in "the nature of a public office," subjecting him and his special contract of employment at "*a stipulated salary for his services during a limited period*" to the general rule applicable to the destruction and termination of offices and the removal of officers. (See "Brief On Behalf Of Appellant On The Merits," and the authorities there cited, pp. 19-22). See also the case of *U. S.* v. *Schturholz*, 137 Fed., pp. 616 to 624, where the difference between a public officer and a public employee is ably discussed; *U. S.* v. *Maurice*, 2 Brock 96, where Chief Justice Marshall said:

> "*Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer.*" (Emphasis ours.)

And *U. S.* v. *Hartwell*, 6 Wall 385, 73 U. S. 830, where it is said:

> "*An office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties* . . . "*A government office is different from a government contract. The latter, is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.*" (Emphasis ours.)

(4) The Court is in error in finding, *as a fact*, that "The act of providing for appellant's employment did not change the nature of the duties which he had performed as Commissioner. Instead of acting as Commissioner he rendered the same service as Superintendent of Public Parks and Streets under the Mayor" (Opinion, bottom of page 3). In so find-

ing, the Court overlooked that the case is here *on the facts as alleged in the petition*, and that no facts are alleged to show what were the duties of appellant as Commissioner of Streets and Parks and what were his duties under his contract of employment. It is clear, however, *that as Commissioner of Streets and Parks he was unquestionably a sworn officer, and whatever were his duties as such they were performed as a sworn officer, vested with governmental functions and powers, in his uncontrolled discretion as an officer. While, on the other hand, his duties as Superintendent of Streets and Parks, whatever their nature under the contract of employment, were to be performed by appellant as a mere employee, under the control of the Mayor, and without governmental authority or powers and without uncontrolled discretion, at a stipulated salary and for a fixed time, and that the act of the Legislature authorizing his employment merely provides that he is to be employed "in the work under the Mayor" without specifying the nature or kind of work to be performed.*

(5) The Court is in error in accepting and following the manifestly erroneous and novel rule announced and applied by the State court in determining the issues of this case instead of applying to a decision of the issues the rule announced by *Justice Story in the Dartmouth College Case*, and subsequently followed and applied in *Hall* v. *Wisconsin* by this Court, and announced in 12 Am. Jur., Section 420, page 53, *Verbo* "Constitutional Law," as follows:

> "It is well settled that state legislatures have the power to enlarge, repeal; and limit the authorities of *public officers* in their official capacities, in all cases where the State Constitutions do not prohibit them, since there is no express or implied contract that such officers shall always exercise such authorities. *When, however, a state legislature makes a contract of employment, it is just as much a contract within the purview of the Constitution's prohibition as a like con-*

tract would be between private citizens." (Emphasis ours.)

Citing: *Mississippi ex Rel. Robertson* v. *Miller*, 276 U. S. 174, 72 L. Ed. 517, 48 S. Ct. 266; *Missouri ex Rel. Walker* v. *Walker*, 125 U. S. 339 (344), 31 L. Ed. 769 (772), 8 S. Ct. 929; *Hall* v. *Wisconsin*, 103 U. S. 5, 26, L. Ed. 302; *Darlmouth College* v. *Woodward*, 4 Wheat (U. S.) 518, 4 L. Ed. 629. See also: *State of Louisiana ex Rel. Fisk* v. *Police Jury*, 116 U. S. 131, 29 L. Ed. 587.

(6) The court erred in holding, in effect, that the question of the right to protection under the contract clause of the Constitution in a contract of employment entered into by a State or municipality with *a particular person for a stipulated salary during a limited period* turns on the question of the kind of service such person is to render under the contract and not on his status under the contract, whether a mere employee or an officer.

(7) The Court erred in failing to consider, in determining the case, the clearly marked distinction or difference between the general rule applicable to "ordinary *public officers*" under the contract clause of the Constitution and the rule applicable to the rights of an individual under a *special governmental contract of employment "for a stipulated salary and for services during a limited period of time,"* as held in *Hall* v. *State of Wisconsin.*

(8) The Court erred in weighing and measuring the Constitutional rights of the appellant, growing out of his special contract of employment for "*a stipulated salary for his services during a limited period,*" by the rule it has heretofore applied to *ordinary governmental employees under a general law*, as announced in *Phelps* v. *Board of Education*, 300 U. S. 319-322, and *Dodge* v. *Board of Education*, 302 U. S. 74, 78, 79, cited and relied on by the Court here, instead of following *the rule applicable to special governmental contracts of employment with a particular person for*

"*a stipulated salary for his services during a limited period of time*," as announced and followed by this Court in *Hall v. Wisconsin, ib.*

(9) The Court erred in that by accepting the erroneous statements of facts made, and approving the novel and unsound doctrine announced and applied by the State Court to a decision of this case, the Court has emasculated a wise and heretofore potent provision incorporated in the Constitution by its authors for the express purpose of compelling states and their instrumentalities, which may come into the control of ruthless and arbitrary officials, to respect and fulfill in good faith their contractual obligations specially entered into with individuals, and to allow no escape therefrom on the spurious claim of governmental immunity.

Petitioner shows that for the reasons hereinabove set forth and amplified in briefs heretofore filed, a rehearing should be granted, and, finally, the judgment herein of the Supreme Court of the State of Louisiana should be reversed and set aside. Petitioner prays, after due consideration a rehearing be granted in this case, and that finally the judgments of the State courts be voided and reversed and judgment rendered in favor of your petitioner.

And for all general and equitable relief, petitioner prays.

By Attorneys,

P. G. Borron,
E. R. Schowalter,
Edward Rightor,
Attorneys for Appellant.

I hereby certify that the foregoing petition for rehearing in the above numbered and entitled cause is presented in good faith and not for delay.

Baton Rouge, Louisiana, May 4, 1939.

P. G. Borron,
Attorney for Appellant and Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 462.—October Term, 1938.

Powers Higginbotham, Appellant, *vs.* City of Baton Rouge, Louisiana.	Appeal from the Supreme Court of the State of Louisiana.

[April 17, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The City of Baton Rouge, in March, 1935, pursuant to Act No. 1 of the First Extraordinary Session of 1935 of the legislature of Louisiana, adopted an ordinance declaring that the City was without authority to retain appellant, Powers Higginbotham, as Superintendent of Public Parks and Streets, and that his employment in that capacity was terminated. Contending that he had been employed for a term continuing until November, 1936, and that the legislation abovementioned constituted an impairment of the obligation of his contract in violation of Section 10 of Article I of the Constitution of the United States, appellant brought this suit to recover the balance of his salary for the stated term. The Supreme Court of the State affirmed the judgment dismissing his complaint. 183 So. 168.

The pertinent legislation with respect to the municipal position in question is comprehensively reviewed in the opinion of the state court. It appears that the City of Baton Rouge has a commission form of government adopted in 1914 under the provisions of Act No. 207 of 1912. The authority of the Commission Council is divided among three departments, viz. (1) the Department of Public Health and Safety, (2) the Department of Finance, and (3) the Department of Public Parks and Streets. It was provided that a Commissioner should be elected for each department, the Mayor being *ex officio* Commissioner of Public Health and Safety. In 1921 the terms of office of the members of the Commission Council were fixed at four years, the election to be had in April. Appellant was elected Commissioner of the Department of Public Parks and

Streets in April, 1931, for a term which was to expire in May, 1935. But in 1934 the date for the election of officers was postponed to November, 1936, and appellant's term of office was extended accordingly. Later, by Act No. 13 of the Third Extraordinary Session of 1934, the legislature abolished the office of Commissioner of Public Parks and Streets and transferred its functions to the Mayor. There was also created a Department of State Coordination and Public Welfare and provision was made for the election of a Commissioner of that Department. This was followed by a proviso that the person then filling the office of Commissioner of the Department of Public Parks and Streets should be entitled to enter the employ of the City, at a salary equal to that theretofore allowed to the Commissioner, "in the work under the said Mayor and said person shall have the right to continue in said service during good behavior until the next general election of officers in said municipality". Appellant was the person thus described, and accordingly, in January, 1935, the Commission Council adopted an ordinance reciting the statutory provisions and providing for the employment of appellant as Superintendent of Public Parks and Streets, under the Mayor, "at the same salary now provided for the Commissioner of Public Parks and Streets, his employment to continue during good behavior and until the next general election for municipal officers". Appellant accepted the employment and entered upon the discharge of his duties, as to the faithful performance of which no question is raised.

The state court held that the position in question was "in the nature of a public office" with governmental functions and that the legislative action in abolishing it did not contravene the constitutional provision as to impairment of contracts. The court referred to the provision of the Act of 1912 abovementioned that "all the powers and authority" conferred upon the City by its charter, not inconsistent with the provisions of the Act, were declared to be "reserved to the City unimpaired" to be exercised by the Mayor and Commission Council. Further, that by the charter of the City (Section 7 of Act No. 169 of 1898) it was provided "that the 'employees' of the City are removable as thereinafter specified" and that by a subsequent provision (Section 52 as amended by Act. No. 209 of 1914) it was declared that "all officers elected by the Council shall be removable by the Council at pleasure". Again, that

by the Act of 1912 it was declared that "any official or assistant elected or appointed by the Commission Council may be removed from office at any time by a vote of the majority of the members of the Council", except as therein otherwise provided, and that there was no exception elsewhere that might be applicable to the present case. The court said that the general rule that a municipal council "may remove at any time any official appointed or elected by the council, or anyone employed by the Council to perform governmental functions", had been recognized in its former decisions which were cited. 183 So. at p. 172.

In this view the state court was of the opinion that the case was not controlled by *Hall* v. *Wisconsin*, 103 U. S. 5, upon which appellant relies,—a case of a contract with a State for the performance of specific services of a scientific character under a statute providing for "a geological, mineralogical and agricultural survey"—a contract which was held to be within the constitutional protection, and rather that the case was governed by the general doctrine reaffirmed in *Newton* v. *Commissioners*, 100 U. S. 548, 557. While the particular question was not involved in that case, the court stated the familiar principle that "the legislative power of a State, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service". *Id.*, p. 559. See, also, *Butler* v. *Pennsylvania*, 10 How. 402; *Crenshaw* v. *United States*, 134 U. S. 99, 106; *Phelps* v. *Board of Education*, 300 U. S. 319, 322; *Dodge* v. *Board of Education*, 302 U. S. 74, 78, 79.

While this Court in applying the contract clause of the Constitution must reach an independent judgment as to the existence and nature of the alleged contract (*Larson* v. *South Dakota*, 278 U. S. 429, 433; *United States Mortgage Co.* v. *Matthews*, 293 U. S. 232, 236), we attach great weight to the views of the highest court of the State. *Coombes* v. *Getz*, 285 U. S. 434, 441; *Phelps* v. *Board of Education, supra; Dodge* v. *Board of Education, supra.* In this instance we find no reason for disagreeing with the conclusion reached by the Supreme Court of Louisiana. The Act providing for appellant's "employment" did not change the nature of the duties which he had been performing as Commissioner. Instead of acting as Commissioner he rendered the same service as Superin-

tendent of Public Parks and Streets under the control of the Mayor. His duties still distinctly pertained to the performance of the ordinary governmental functions of the City in the supervision of its streets and parks and his position as Superintendent both with respect to duties and tenure may properly be regarded as subject to the control of the legislature and of the Commission Council acting under its authority.

The judgment is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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